IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 427

A/S J. LUDWIG MOWINCKELS REDERI,
Petitioner,
against
MANUAL AMADOR,
Respondent-Libelant,
and against
COMMERCIAL STEVEDORING CO., INC.,
Respondent-Respondent Impleaded.

PETITIONER'S BRIEF IN REPLY

Statement

In the interest of pin-pointing the issues which have been scrambled by respondent Amador's brief in opposition, petitioner finds it necessary to file a reply brief. In general on this petition, respondent Amador seeks to reargue the facts not only by expressing disagreement with the findings of the District Court, but also dissatisfaction with the limited grounds upon which the Court of Appeals based liability, possibly appreciative of how untenable those grounds are.

The basic questions here, however, are

(1) Whether petitioner has been deprived of its right to have the facts determined by the trial judge, who saw and heard the witnesses, in accordance with this Court's opinion in *McAllister* v. *United States,* 348 U. S. 19, and

(2) Whether the shipowner may be held for the sole and gross negligence of the stevedore.

Unless the vessel were unseaworthy, unless the petitioner were negligent, there can be no liability of petitioner. The petitioner therefore wishes to make four brief points.

POINT I

The vessel could not have been unseaworthy.

The District Court found the vessel in all respects seaworthy in its cargo stowage. The Court of Appeals' only criticism of the stow was founded on the juxtaposition of the New York steel and the Baltimore wire. The Court of Appeals held this to be only conditionally seaworthy and conditioned upon the removal or the shifting of the Baltimore wire in order to accomplish the safe discharge of the New York steel. As shown in the petition, the Court of Appeals' opinion is not compatible with the finding of the District Judge explaining how the steel could safely be taken out of the hold by the use of stays or guide lines in accordance with the expert testimony of Captain Lie.

Only if the drafts of steel would necessarily come into collision with the wire reels, only if there were no safe and suitable method of discharge, can there be any justification for the conclusion of the Court of Appeals that shifting the wire reels was compulsory to seaworthiness. If the steel could be discharged in New York with only ordinary difficulty, as the District Judge found, it is impossible to say that the relationship of one cargo to another in the hold of the vessel could make the vessel unseaworthy.

The vessel would be no more unseaworthy under these circumstances than if stays or guide lines were necessary to prevent the swinging two ton drafts of steel from colliding with a part of the ship's structure and that part collapsed as a result of the stevedore's failure to use stays or guide lines.

Respondent Amador, agreeing that there was a reversal on the facts, tries to make the point that because of the frequent collisions between the steel and the wire, the cargo of ~~steel~~ reels became unseaworthy and was so for a considerable period. The Court of Appeals did not, however, base its decision on the condition of the stow of wire reels following their being struck by the steel drafts, but rather on the position of the wire reels with respect to the stowage of the steel drafts. In any event, the District Court held (Finding No. 5, page 3A, Petitioner's Appendix) that the immediate cause of the accident was the collision between the particular draft of steel prior to the one respondent Amador was engaged in preparing. The Court of Appeals accepted this finding.

POINT II

The findings of the District Court and the evidence upon which they are based show clearly that petitioner was not in control of the stevedores' work nor was the petitioner negligent.

Since the vessel was not unseaworthy in its cargo stowage, we proceed now to respondent Amador's claim asserted in his brief

(a.) that despite contrary findings by the Trial Judge, the petitioner by its Second Officer was in control of the work at the hatch where respondent Amador was injured and, further,

(b.) that petitioner, through its Second Officer, was negligent.

(a) Control

The language in finding No. 7 of the District Judge is pertinent as to control.

> "The superintendence and direction of the stevedores' work was entirely that of respondent stevedoring company which employed the men, including libelant."

The Court of Appeals made no finding that this was clearly erroneous and the testimony supporting it is substantial as will be shown.

If any control were exercised by petitioner, it could only be exercised through Second Officer Lunde. The testimony accounted for the whereabouts of the following people:

(1.) The Master of the Ronda had gone ashore during the morning on ship's business (p. 315, Record);

(2.) The Chief Officer was visiting the dentist on the day of the accident (p. 197, Record);

(3.) The Third Officer's work confined him to the foredeck that is, hatches 1, 2 and 3 of the vessel (pp. 198, 315, Record);

(4.) Captain Bentson, the representative of the ship's agent, testified he left the vessel and the pier before the accident (p. 257, Record).

As to Second Officer Lunde, he testified (p. 327, Record) that he was in command of the entire ship on the day of the accident and that meant all five hatches in addition to his other duties. He said that he first spoke to the hatch boss (p. 322, Record) about the collision at 8:30 in the morning and that after he admonished the latter, he went around the ship and when he came back he saw the collision happen again and again told the hatch boss to be careful. The accident, however, did not happen until later

in the day. When the accident did happen, Second Officer Lunde testified (p. 323, Record) that he was on the foredeck (The foredeck being separated from the afterdeck by the ship's superstructure and therefore out of view). When he went aft, the injured man had already been removed from the vessel. Lunde was asked on cross-examination (p. 339, Record) the total time spent throughout the whole day of the accident in hatch No. 4. His answer was, "Fifteen, twenty minutes."

The brief in opposition by respondent Amador tries by a half-page extract from the testimony of the Second Officer and by its general tenor to have this Court believe that the Second Officer spent all his time supervising and directing the discharge of steel from No. 4 lower hold of the m/s Ronda on the day of the accident. His testimony speaks for itself. It was uncontradicted.

Second Officer Lunde's responsibilities were to the vessel as a whole. He was in no position to supervise the discharge at any particular hold and did not in fact do so. Therefore, the finding of the District Court that the supervision and direction of the work at No. 4 hold was entirely that of the stevedores cannot be said to be clearly erroneous. Moreover, it was not held by the Court of Appeals to be clearly erroneous.

(b) Negligence

The District Court did not find Second Officer Lunde negligent in any degree. The Court of Appeals did not find any fault with Lunde's conduct except in one particular and that was his failure to see to it that the cargo of wire reels was shifted or removed so that the steel might be safely discharged. As shown in Point I herein and in the petition, this was not necessary, for according to the expert testimony, the cargo could have been discharged by the use of stays or guide lines. As shown in the petition (p. 12), stays or guide lines were stevedores' property and

under the control of the stevedore foreman. For the same reason that the vessel could not be unseaworthy, the Second Officer could not be negligent for failure to shift the wire reels.

The opinion of the Court of Appeals (p. 10a, Petitioner's Appendix) states that Second Officer Lunde twice saw the drafts hitting the coils and twice cautioned the hatch boss to be careful. Lunde testified he twice received the hatch boss' acknowledgment that he would be careful (p. 322, Record). When Lunde told the stevedores to be careful, he was telling them in his own non-legal way to conduct themselves as prudent stevedores. This, of course, was their responsibility in any event. Prudent stevedores, according to Captain Lie's expert testimony and the findings of the District Judge, would have used guide lines or stays. Second Officer Lunde could not have been negligent himself for failure to anticipate that the stevedores would not only be imprudent and ignore his admonitions, but would be so reckless in their conduct so as to prompt the Trial Judge to say (Finding No. 7):

> "So gross was their negligence that not even the repeated collisions served as warnings to take measures to avoid dislodging the stow of coils."

Second Officer Lunde left the hatch early in the morning and did not return until after the accident. He could not have been in control of the work and he could not have been negligent.

POINT III

The decision of the Court of Appeals makes the shipowner liable for the sole negligence of the stevedore and hence is in conflict with established law.

While the Court of Appeals pays lip service to the proposition that the shipowner will not be responsible if "the longshoreman were merely negligent in discharging

a well stowed cargo", its decision is quite the opposite. The District Court held that the stevedore's failure to use stays or guide lines was gross negligence. The Court of Appeals quoted this language without approval or disapproval. Unless this negligence be imputed to the shipowner, there can be no liability. If it is imputed to the shipowner, then the decision of the Court of Appeals is in conflict with the decisions of other Circuits as cited in the petition (Point 4).

While the issue here may in a sense be narrow in that a particular shipowner has been denied its proper review and has been made responsible for another's sole and gross negligence, it is also broad in that this action will now be cited for the proposition that, although the stevedore be grossly negligent, although the immediate and proximate cause of the accident be a failure to use equipment which the stevedore has contracted to provide and which is in their control, and although the superintendence and direction of the work is under the exclusive control of the stevedore, still the shipowner must be fully responsible for accidents arising under these circumstances because it did not anticipate or take precautions against the stevedore's negligence.

POINT IV

The only opportunity for review by this Court is now.

In Point II of respondent Amador's brief it is said that petitioner cannot complain of an injury it may never suffer because it may have indemnity. Overlooked is the fact that the issue of petitioner's liability to respondent Amador has now been foreclosed. Even respondent Amador does not wish to await the outcome of another trial on the indemnity issue, another appeal and finally an appeal to this Court by way of a petition for a writ of certiorari. If petitioner is not liable to respondent, it can be determined

now without awaiting further activity in the District Court, the Court of Appeals and finally in this Court.

There is ample reason for this Court exercising its discretion in favor of petitioner. If this Court is of the opinion that the Court of Appeals for the Second Circuit has not profited by this Court's reversal in *McAllister* v. *United States,* 348 U. S. 19, then the petition should be granted. Whether or not a Court of Appeals properly performs its reviewing function is certainly a matter for this Court's supervision.

This Court need not dwell extensively on this petition. The opinion of the Court of Appeals is "clearly erroneous" enough to warrant summary reversal.

Respectfully submitted,

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On the Reply Brief.